

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing	)	CG Docket No. 05-338
the Telephone Consumer Protection	)	CG Docket No. 02-278
Act of 1991	)	
	)	
Junk Fax Prevention Act of 2005		

**COMMENTS OF THE  
TEXAS OFFICE OF PUBLIC UTILITY COUNSEL**

The Texas Office of Public Utility Counsel, (“Texas OPC”), offers these reply comments pursuant to the Commission’s proposed rulemaking implementing the Junk Fax Prevention Act of 2005 (“Junk Fax Prevention Act” or “JFPA”) published in the *Federal Register* on December 19, 2005. Texas OPC represents the interests of residential and small commercial telephone and electric customers before the Public Utility Commission of Texas, state and federal courts, the Federal Communications Commission (“Commission” or “FCC”) and the Federal Energy Regulatory Commission.

In the paragraphs below, Texas OPC offers comments in reply to initial comments filed by various parties, including the American Bar Association (“ABA”); the Attorneys General of Arkansas, Connecticut, Kentucky and New Mexico (“Attorneys General”); Direct Marketing Association (“DMA”); the

Electronic Privacy Information Center (“EPIC”); Jimmy A. Sutton; the U.S. Small Business Administration’s Office of Advocacy (“SBA Advocacy”); and Verizon.

In these reply comments, Texas OPC asks the Commission to keep in mind the adverse impact of junk faxes on the truly small consumer, such as the one to ten person professional office, the mom and pop operations, home businesses and individuals with home offices. The costs in resources, time, lost opportunities, and aggravation caused by the receipt of numerous unwanted, unsolicited junk faxes are unwarranted and constitute an unnecessary cost of business for these consumers. Texas OPC respectfully urges the Commission to adopt strong protections for consumers that both facilitate their ability to “opt-out” of future fax advertisements (including the ability to identify and respond to both the advertiser and fax broadcaster), and to place the responsibilities and burdens associated with the unwanted fax relationship on those who sought to profit from the advertisement – the advertiser and the broadcaster.

### **Established Business Relationship (“EBR”) Exemption**

#### **A. Duration**

Texas OPC disagrees with the DMA and other commentators that the time limit on EBRs should be at least as long as that applicable to telephone solicitations, generally and that a longer period to send faxes is warranted. Just the opposite is true. Texas OPC agrees with the Attorneys General that

the shifting of economic costs such as lost time and opportunities that occurs when recipients have to deal with unsolicited junk faxes creates a valid reason for imposing a shorter lifespan for EBRs in the unsolicited fax advertisement context. As this Commission noted in 2003, not only do recipients have to bear the costs of paper and toner needed to print the unsolicited ads, the recipients also had to devote time reading and disposing of the faxes, they lost the use of their fax machines while the unsolicited ads were being received and printed, and to top it all off, the recipients often had to endure these intrusions in the middle of the night. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, Report and Order, 18 FCC Rcd 14014, ¶ 186 (2003). Even taking steps to eliminate the intrusion takes time and effort; the recipient must look for the information on the fax to see who to send the opt-out message to and how. For this reason, it is critical that the opt-out and identification rule provisions focus on the impact on the recipient and do as much as possible to ease the un-asked for burden that has been placed upon them.

**B. Burden of Proof of the Existence of an EBR / Voluntary Agreement to Make Fax Number Available For Receiving Advertisements**

Texas OPC agrees with EPIC that the burden of proving the existence of an EBR should rest upon the party seeking to profit from the fax, i.e. the sender. Texas OPC is concerned that because of the various tactics that have been used to compile directories and databases, that voluntary agreement or consent cannot be presumed. In its comments, EPIC describes circumstances

in which customers are asked for information at the point of sale (without disclosure for how it will be used) and that information is then used to obtain more information from “data brokers” about the customer. Certainly, a customer whose fax number is obtained from a third source should not be considered to have voluntarily agreed to receive faxes. Even more disturbing is the use of “ANI” information by a company for its own purposes or for sale to a data broker. Again, no consent can be inferred from the fact that a person made a call to a toll-free number.

Similarly, no consent can be inferred from the mere fact that the recipient’s fax number appears on a website. Texas OPC agrees with the Attorneys General and EPIC that a fax number’s general availability does not mean that the recipient is open to receiving solicitations via fax, and businesses, governmental agencies, non-profit organizations and other entities who make their fax number generally available certainly do not expect that the number will be harvested for other persons’ commercial purposes. As EPIC noted, many entities are required to make this information publicly available. Even for those who are not so required, in general, a fax number is made available so that customers, clients, prospective customers and clients and others with whom they conduct business can contact them in furtherance of their business or organization’s mission. Voluntary agreement to receive fax advertisements should not be

found in these circumstances unless the website also contains a statement expressly indicating this.

Finally, any voluntary consent to allow a company with an EBR to send unsolicited faxes to the recipient cannot be transferred to a third party such as a fax broadcaster for sending ads for different companies or even subsidiaries or affiliates. Texas OPC joins with the Attorneys General in urging the Commission to promulgate specific rules to clarify that the EBR exemption only applies when the *seller* is the party claiming the EBR and that the EBR is non-transferable. *See* 47 C.F.R. § 64.1200(f)(5).

For the above reasons, the Commission should require that the sender keep records that show express consent by the recipient or records that show that the EBR is current and that the recipient has been given the appropriate opt-out information.

### **C. Establishing EBR via Application/Inquiry**

Texas OPC agrees with the comments of the Attorneys General that when attempting to assert an EBR due to an application or inquiry made by recipient, that the sender must show that the inquiry/application was more than a casual conversation. The Commission should require in these instances that the sender have documentation of the precise circumstances giving rise to the EBR for each recipient. This is not overly burdensome because many forms of documentation already employed by businesses could satisfy this requirement such as telephone logs, copies of information request

forms received from recipient, customer service records and billing/shipment records. Such records are commonly kept by businesses of all sizes in either electronic or hard copy format. In order for the EBR exemption to stay true to the original intent of allowing fax advertisement between two consenting parties, the Commission needs to ensure that senders are not allowed to rely on tenuous contacts as an excuse to solicit with fax advertising.

### **Opt-Out Requirements**

#### **A. Time Limit for Compliance**

Texas OPC disagrees with DMA and SBA Advocacy that a 30-day limit for complying with an opt-out request is warranted. Thirty days is too long.<sup>1</sup> While the soliciting business does need some time in which to carry out an opt-out request, this consideration must be weighed against the fact that every day that an opt-out request is not complied with is another day in which the recipient can be inundated with unsolicited faxes. Each fax received imposes costs upon the recipient. Additionally, the frustration experienced by a recipient who has taken the time and sent in an opt-out request, yet still receives junk faxes, would increase. The recipient may take even more time out of the business day to send another opt-out request or send a complaint to an agency or other organization complaining of the

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<sup>1</sup> While the compliance time for telemarketers is 30 days, Texas OPC agrees with the Attorneys General that a shorter compliance period is justified in this context because of the costs imposed on recipients of junk faxes.

situation. This can be avoided to a large extent by requiring a shorter compliance period.

Texas OPC agrees with the Attorneys General that a more reasonable compliance period would be three to ten day business days such as the FTC requires (10 days) or is considering requiring (3 days) for opt-out requests relating to email advertisements.

#### **B. Clear and Conspicuous Notice Requirements**

Texas OPC disagrees with SBA Advocacy's comments which recommend that the FCC not define the requirement except to say that notice will be held to a "reasonable standard." Contrary to the SBA Advocacy's assertion it is when a standard is left undefined that the agency is more susceptible of getting mired down. A clearly defined standard helps all parties involved because it sets clear standards to safeguard the fax recipients and offers the sending parties standards by which they can remain in compliance with the law. Texas OPC agrees with EPIC that the opt-out notice should be separate from the advertising copy, should identify that it is being sent pursuant to an EBR, identify the company asserting the EBR in a manner such that the recipient could self-verify that they do indeed have an EBR, and identify the fax broadcaster, if it is not the company with the EBR. Identification of the fax broadcaster is necessary so that the recipient can send a do-not-fax request to the broadcaster as well because the recipient may not wish to receive any advertisements from any entity via fax.

“Clear” and “Conspicuous” are two separate standards, both of which are vital to ensuring that a recipient has a true opportunity to opt-out of receiving junk faxes. Under Texas law, “Conspicuous” is an objective standard, and with reference to a term “means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is ‘conspicuous’ or not is a decision for the court. Conspicuous terms include the following:

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.”

Tex. Bus. & Comm. Code Ann. § 1.201(10) (Vernon 1994 & Supp. 2005). When looking at the meaning of the term “Clear,” the Supreme Court of Texas looked to Black’s Law Dictionary which defines “Clear” as “obvious; beyond reasonable doubt; perspicuous; plain.” *Portland Tradewinds Ford v. Lugo*, 613 S.W.2d 26, 29 (Tex. 1981). Texas OPC also recommends that the Commission include in its standard for “clear and conspicuous” notice the standard found in the California Supreme Court opinion quoted by the Attorneys General – that the notice must be “stated precisely and understandably, in words that are part of the working vocabulary of the average layperson.” *Haynes v. Farmers Insurance Exchange*, 32 Cal. 4<sup>th</sup> 1198, 1204, 89 P.3d 381, 13 Cal. Rptr.3d 68 (2004).



In order for the Opt-Out mechanism to have effect and provide recipients relief from unwanted junk faxes, the Commission must require that the opt-out information be placed and worded so that it is actually noticed and understood by consumers. Adopting the above-mentioned standards would help ensure that this is accomplished.

## C. Cost-Free Opt-Out

### 1. Cost-Free Methods

Texas OPC agrees that a local telephone call should be deemed cost-free for recipients in that local calling area. A local fax number that is able to receive faxes (i.e. is not designated “send-only”) may perhaps be the best cost-free solution because the recipient can take care of the opt-out quickly while still at the fax machine. Texas OPC also recognizes that email or websites are also cost-free but should not be allowed as the only cost-free method offered to recipients because the digital divide may preclude some recipients of taking advantage of this cost-free option. A toll-free number for either calling or faxing is also an appropriate cost-free option. The costs involved with maintaining a toll-free number are declining, thanks to the advent of VOIP services. It is not unreasonable to require a business taking advantage of a form of advertisement that is not cost-free to the recipient to incur the relatively low cost of maintaining a toll-free line so that the recipients can opt-out without incurring additional unwarranted costs.

Texas OPC disagrees with the DMA and the Attorneys General that it okay to require the recipient to pay for a postcard and postage, or paper, envelope and postage (and make sure it gets mailed) and deem it “cost-free.” While mailing one opt-out may not make much of an impact, many recipients receive junk faxes from many advertisers – which can add up in dollars and time. We do not oppose having this listed as an additional method for opting

out but another truly cost-free method should also be included in the opt-out information.

Finally, Texas OPC disagrees with SBA Advocacy that senders should only be required to comply with opt-outs received via the method chosen by the sender. If the recipient truly has an EBR with the sender and has other valid contact information, the recipient should not have its opt-out disregarded merely because it was sent for example, by U.S. Mail rather than by telephone. DMA argues that senders have the right to manage their dataflow and that a sender should only be required to accept opt-outs sent by the means they specify. Recipients have the right to manage their dataflow, too and if senders are allowed to ignore opt-outs simply because they are received by the sender via a different communication method than what is specified, the recipient's ability to do so is thwarted and they will continue to receive an influx of unsolicited faxes. Senders can avoid this problem to a large extent by providing recipients multiple methods of sending opt-outs.

## 2. Small Business Exemption?

The comments submitted by SBA Advocacy focus on the effect upon "small business" senders of unsolicited faxes while ignoring the effect on the small business recipients. As the representative of the interests of Texas small commercial telecommunication consumers, Texas OPC cannot ignore the impact on these small businesses who have already been burdened with the costs of receiving faxes they have neither asked for or want. Depriving

them of a cost-free mechanism by which to stop the influx of the junk faxes only exacerbates the problem. Small business recipients should not be forced to subsidize the business of others – even if the senders are also small businesses. Again, Texas OPC urges the Commission to remember the truly small operations such as the small professional offices, home businesses and mom-and-pop operations, and the burden these junk faxes are to them. For many of these small operations, the fax machine is a lifeline – they should not have to pay for the privilege of unclogging it. As noted by EPIC, much of the junk fax problem can be attributed to small businesses. Exempting them emasculates the cost-free requirement. The expense of maintaining a cost-free mechanism such as a toll-free number is a cost of doing business that the sender should factor in when deciding how many, and to whom to send, the unsolicited faxes. The cost of the fax relationship should be on the party who initiated it with the intent to profit, regardless of the size of the business.

#### **D. Trade Association Exemption**

If the Commission chooses to exempt trade associations from the opt-out requirement, the Commission should carefully limit the scope of the exception. Texas OPC shares the Attorneys General concern about the lack of definition of “profession or trade association” and the ambiguity of the phrase “in furtherance of the association’s tax-exempt purpose.” Texas OPC recognizes that many organizations such as the ABA do give their members clear and easy to use opportunities to choose what method(s) of

communication they wish to have with the association, but this does not mean that every association does.<sup>2</sup> In order for an association to be eligible for the exemption, the Commission should require that the association provide its membership with ample opportunities to choose how and what type of communications they wish to receive from the association.<sup>3</sup>

Further, the Commission should make clear that the exemption does not extend to communications made by the association to prospective members who have not had the same opportunities as members to choose a communication option, and that any exemption the association may have does not extend to third parties who purchase information from the associations – even if this generates revenue which funds the association’s activities.

#### **E. Effect of Continuing to Do Business After Opting-Out**

Texas OPC agrees with EPIC and the Attorneys General that a recipient who has opted-out has made a clear expression of her intent to no longer receive fax advertisements from the sender, and consent to send faxes to the recipient can no longer be implied. As noted by EPIC, It is common for consumers continues to do business with a company but limits the company’s

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<sup>2</sup> Texas OPC notes that the ABA also maintains a toll-free number for members’ use.

<sup>3</sup> This is consistent with the JFPA’s amendment to 47 U.S.C. § 227(b)(2) which authorizes the Commission to include such an exemption if the Commission determines that the opt-out notice otherwise required “is not necessary to protect the ability of members of such associations to stop such associations from sending any future unsolicited advertisements.”

marketing channels. A common example is when a person purchases goods online but declines to check the box to receive coupons and notices of sales from the online merchant. The intent expressed in an opt-out situation is even clearer; the recipient has taken the time to relay to the sender her that fax advertisements are not welcome – the recipient should not be “punished” for then continuing to do business with that company by having the opt-out deemed erased. Only a subsequent express communication that the recipient now wishes to receive faxed advertisements from the sender should trump the opt-out.

**F. Record-Keeping Requirement**

Texas OPC supports Attorneys General recommendation that the Commission require senders to maintain records of do-not-fax requests/opt-outs as well as records showing that these requests were honored. The sender should bear the burden of maintaining these records and any should also keep records of any subsequently received express consent to resume sending fax advertisements to the recipient. These record-keeping requirements should also help with enforcement efforts.

**Identification Requirements**

**A. Violation of Identification Requirement & the EBR Exemption**

Texas OPC agrees with the comments of Jimmy A. Sutton that a “violation of federal regulations requiring identification on faxes should never lead to establishing an EBR exemption for future junk faxes.” As noted by

the Attorneys General, many recipients do not report violations of the JFPA because of a lack of identifying information on the fax, and in some instances, the only identifying information is a return telephone number for responding to the ad. Recipients who take steps such as calling the sales number on the fax in order to discover the identity of the sender should not then have that call be construed as establishing an EBR on the basis of inquiry or application. Texas OPC recommends that the Commission clarify by rule that no EBR is established in such a circumstance.

## **B. Spoofing**

Texas OPC shares the concerns expressed by Verizon about the effects of spoofing and the apparent loophole fax broadcasters may be taking advantage of. Spoofing is increasingly used by fax broadcasters who too often send faxes to phone numbers rather than fax machines. When that occurs, the only information a recipient has is what shows up on Caller ID. But because the fax broadcaster used spoofing to display an unassigned number instead of a valid number, the consumer cannot return the call. Spoofing prevents recipients from being able to exercise the right to opt-out of unwanted fax solicitations because spoofing prevents recipients from receiving accurate information that would permit them to make an opt-out request. Spoofing complaints flood telecommunication providers' Unwanted Call Centers, thereby inhibiting the Centers' ability to address other complaints; making matters worse, the Centers are unable to help the

consumer or do anything about the spoofing because even they cannot identify the violator. Finally, thwarts enforcement of the ban on junk faxes because neither the recipient nor his carrier is able to identify the source of the fax, and thus they cannot report the violation to the state authorities or to the Commission. Texas OPC joins Verizon in recommending that the Commission amend 47 C.F.R. § 64.1601(e) so that the Caller ID rules governing telemarketers also apply to fax broadcasters.

**C. Fax Broadcaster Information**

Texas OPC agrees with the Attorneys General that when the transmitting entity determines the destination of the fax advertisement or maintains the database from which the fax number was taken, that transmitting entity should be required to include its identifying information on the fax. We further agree that the Commission should amend its rules to require senders to name under which it does business in the recipient's state or the d/b/a or abbreviation of the sender's name that would be apparent to a reasonable recipient.

Texas OPC also agrees with the Attorneys General recommendation that if the business advertising the goods is not the sender of the fax then the notice should include the identity of the business, a valid address for the actual place of business, and a local or toll-free number for the recipient to use to opt-out from any faxes by the advertising business and from any further faxes transmitted by the transmitting entity. Requiring this



information will help recipients to “self-verify” that an EBR exists and to exercise their right to opt-out; it will also help with enforcement efforts by the states, the Commission and the FTC.

Finally, Texas OPC joins the Attorneys General in proposing that the Commission reaffirm its conclusion that fax broadcasters may be liable for violations of the statutes and rules governing fax advertising. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, Report and Order, 18 FCC Rcd 14014, ¶ 186 and ¶ ¶ 194-95 (2003).

#### **Time of Day Restrictions**

In their Comments, the Attorneys General proposed that the Commission take the opportunity presented in this rulemaking to limit the transmission of fax advertisements to the hours of 8:00 a.m. and 9:00 p.m., recipient’s local time, as is required for telemarketing calls under 47 C.F.R. § 64.12009(c)(1). Texas OPC requests that the Commission again remember the large number of home businesses and individuals with home offices, and “the intrusiveness of faxes transmitted at inconvenient times, including the middle of the night,” and amend or clarify its rules so that fax advertisements are subject to this reasonable time of day limitation.

#### **Conclusion**

Texas OPC thanks the Commission for this opportunity to remind the Commission of the adverse impact of junk faxes on the truly small consumer,

such as the one to ten person professional offices, the mom and pop operations, home businesses and individuals with home offices. The costs in resources, time, lost opportunities, and aggravation caused by the receipt of numerous unwanted, unsolicited junk faxes are unwarranted and constitute an unnecessary cost of business for these consumers. Texas OPC respectfully urges the Commission to adopt rule provisions as described in these comments that both facilitate the ability to “opt-out” of future fax advertisements (including the ability to identify and respond to both the advertiser and fax broadcaster), and to place the responsibilities and burdens associated with the unwanted fax relationship on those who sought to profit from the advertisement – the advertiser and the broadcaster.

Dated: February 2, 2006

Respectfully submitted,

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